



BOARD DECISION

RFR 2019-04 / LA19017

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary LA19017

Sundown Feeders Ltd.

August 13, 2019

Background

On July 8, 2019, Natural Resource Conservation Board (NRCB) approval officer Joe Sonnenberg issued Decision Summary LA19017 and Approval LA19017 with conditions, to expand an existing beef confined feeding operation (CFO) owned and operated by Sundown Feeders Ltd. (Sundown) at NW 1-8-21 W4M in the County of Lethbridge (County). The proposed expansion includes:

- Increasing livestock numbers from 2,500 beef feeders to 3,500 beef feeders
- Constructing a new catch basin (55 m x 50 m x 2 m deep)
- Constructing new feedlot pens (140 m x 80 m)
- Constructing a new recovery pen (35 m x 20 m)

Pursuant to section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, a Request for Board Review (RFR) of Decision Summary LA19017 was filed by Borden Ladner Gervais, on behalf of its client, Mr. Shawn Sakamoto (Mr. Sakamoto). Mr. Sakamoto's filed request for Board review met the 10-day filing deadline established by AOPA.

Under authority of section 18(1) of the *Natural Resource Conservation Board Act*, a division of the Board consisting of Page Stuart (Panel Chair), Sandi Roberts, Keith Leggat, and Daniel Heaney was established on July 31, 2019, to consider the RFR. The Board convened to deliberate on the RFR on August 6 and 8, 2019.

Jurisdiction

The Board's authority for granting a review of an approval officer's decision is found in section 25(1) of AOPA, which states:

- 25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,*
- (a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or*
 - (b) schedule a review.*

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. Section 13(1) of the AOPA Administrative Procedures Regulation (Procedures Regulation) describes the information that must be included in each request for Board review.

Documents Considered

The Board considered the following information:

- Decision Summary LA19017, dated July 8, 2019
- Approval LA19017, dated July 8, 2019
- RFR filed by Mr. Sakamoto, submitted July 29, 2019
- Rebuttal filed by Sundown, submitted August 1, 2019
- Portions of the public record maintained by the approval officer

Board Deliberations

The Board met on August 6 and 8, 2019, to deliberate on issues raised in the RFR. The Board must dismiss a request for Board review if, in its opinion, the issues raised in the request were adequately dealt with by the approval officer or the issues are without merit.

While the RFR covered a number of issues, it focused on the following:

- Adequacy of notice
- Surface water quality
- Impacts from loss of grandfathered status
- Effects on the Sakamoto family, the Sakamoto property, the environment and the community at large
- Non-compliance with manure storage and animal carcass disposal requirements

Adequacy of Notice

The RFR stated that there was a significant delay in Mr. Sakamoto's receipt of notice of the Sundown application. Mr. Sakamoto asserts that, as a result of this delay, he did not have an opportunity to gather and submit either evidence in support of his concerns, or contrary evidence relevant to the application.

In Decision Summary LA19017, the approval officer identified that the affected party radius for this application is 1.5 miles. The approval officer sent 61 courtesy letters to addresses that the County provided as belonging to owners and occupants of land within the affected party radius. The approval officer stated that the NRCB published notice of the application in The Sunny South News on May 7, 2019, and posted the full application on the NRCB website for public viewing.

The Board reviewed the legislated approvals standard for the notification of affected persons, as set out in AOPA section 19(1), which states:

19(1) On receipt of an application for an approval or an amendment of an approval, the approval officer may notify or require the applicant to notify the affected persons, and the approval officer may notify or require the applicant to notify persons and organizations who are to be notified under the Environmental Protection and Enhancement Act and the Water Act with respect to the subject-matter of the application under this section and any other persons or organizations the approval officer considers appropriate.

"Notice" is described in Part 3 of the Procedures Regulation section 31(1):

31(1) Subject to subsection (2), any notice required to be given under the Act or this Regulation may be given

- (a) by personal delivery,*
- (b) by public advertisement in a daily, weekly, bi-weekly or monthly newspaper in circulation in the community affected by the proceeding,*
- (c) by courier service, ordinary mail, fax or electronic means to the address given by the person, or*
- (d) by any other method that the Board directs.*

NRCB Operational Policy 2016-7, section 7.4 Notice of Permit Applications, establishes the procedures for achieving the notice requirements of AOPA, stating:

Section 7.4.1 Approval officers will publish notice of approval and registration applications in the primary local paper that serves the area within which the development is proposed.

NRCB Operational Policy 2016-7, section 7.4.2 Courtesy Letters, Approval and Registration Applications refers to courtesy letters:

Courtesy letters are not the official notice for the application, but refer the recipient to where the official notice is published and include contact information for the NRCB.

The courtesy letter was mailed on May 3, 2019 to owners and occupants of land within the 1.5 mile affected party radius determined for this application. The courtesy letter to Mr. Sakamoto was returned as undeliverable. The Board notes that Mr. Sakamoto was sent an email on May 28, 2019 with the courtesy letter attached.

The Board finds that the publication of Notice of Application in The Sunny South News meets the requirements of both AOPA section 19(1) and Procedures Regulation section 31(1), and is consistent with NRCB Operational Policy 2016-7. Therefore, the Board finds that the approval officer adequately addressed the issue of notice.

Surface Water Quality

The RFR expressed concern about the potential risk this proposal may pose to surface water quality, specifically regarding the location of the facilities with respect to the local flood plain. It asserted that the approval officer's determination about the potential for flooding at this site was not properly considered or addressed, and remains outstanding. It also noted that the decision did not take into account the site-specific details of this particular facility and its unique location.

In Decision Summary LA19017, Appendix B, the approval officer discussed his consideration of the potential for flooding at this site and refers to the requirements of the AOPA Standards and Administration Regulation (Standards Regulation) sections 8, 7(1)(c), 19, and 6.

The Board has reviewed these sections of the regulation. Section 8 describes the requirement for the location of manure storage facilities and manure collection areas with respect to the 1:25 year maximum flood level, or the highest known flood level:

8(1) The 1:25 year maximum flood level at a manure storage facility or at a manure collection area must be not less than one metre below any part of the facility where run-on can come into contact with the stored manure.

(2) If the 1:25 year maximum flood cannot be determined, the manure storage facility or manure collection area must be not less than one metre below any part of the facility where run-on from the highest known flood level can come into contact with the stored manure.

The Part 2 Technical Requirements document (Technical Document) for LA19017 identified that the elevation of the floor of the lowest manure storage or collection facility above the 1:25 year flood plain or the highest known flood level is 5+ metres, and the approval officer commented that the site is "not located in a known flood plain" and meets the regulations. The Decision Summary stated, "Though the grandfathered catchment area is located in a localized low lying

area, it is considered to be a CFO facility rather than a flood plain. Additionally this area is wholly contained on land owned by the applicant.”

Section 7(1)(c) requires that manure storage areas must not be constructed less than 30 metres from a common body of water:

7(1) The owner or operator of a manure storage facility or a manure collection area must not construct the facility or area...

(c) less than 30 metres from a common body of water.

The Technical Document noted that the nearest common body of water is the St. Mary River Irrigation District (SMRID) canal that it is 170 metres from the facilities.

Section 19 of the Standards Regulation describes when the construction of a catch basin may be required and its minimum storage capacity:

19 (1) If required by an approval officer, the owner or operator of a long term solid manure storage facility or a confined feeding operation must construct a catch basin that meets the requirements of this section.

(2) The catch basin must have a storage capacity that can accommodate at least a one day rainfall that has a one in 30 year probability, as calculated in accordance with Schedule 2.

(3) In addition to the storage capacity under subsection (2), the catch basin must have a freeboard of not less than 0.5 metres when the basin is filled to capacity.

(4) The catch basin must have a marker that is clearly visible at all times and that indicates the minimum volume required to accommodate a one day rainfall that has a one in 30 year probability, as calculated in accordance with Schedule 2.

The Decision Summary described that this proposal includes decommissioning an existing unauthorized catchment area and constructing a new catch basin with an AOPA approved liner to contain runoff from the feedlot pens. It will be located so as to overlap the existing catchment area’s footprint. The approval officer concluded that the proposed catch basin will meet all of the requirements. Condition 13 of Approval LA19017 defines the decommissioning requirements, and conditions 1 through 4 are construction conditions for the new catch basin.

Section 6 of the Standards Regulation describes in detail when surface water control systems may be required, and what they must comply with, including that the system must limit the amount of surface water and run-on and runoff:

6(2) The design, placement, construction, installation, maintenance, replacement, removal and operation of the surface water control system must comply with the following:

(a) the system must limit the amount of surface water and run-on and runoff flowing through and from the operation or facility....

Additionally, in Appendix B the approval officer stated, “In the unlikely event manure did escape the CFO, it is improbable that this manure would enter the SMRID canal, Six Mile Coulee, or the Oldman River due to the flat nature of the landscape and distance between the facilities and surface water.”

Considering all of this evidence together—distance to the nearest common body of water, topography, catch basin location in a low lying area totally contained on land owned by the applicant, and catch

basin design that meets all of the requirements of the regulations including those for capacity—the Board finds that the approval officer properly and adequately dealt with the potential environmental risks associated with surface water quality.

The Board also finds that the approval officer did take into account site-specific details of this particular facility and its unique location by utilizing the Environmental Risk Screening Tool (ERST) for existing and proposed facilities. This is described in the Decision Summary, section 5. The approval officer found that, “All of the CFO’s existing and proposed facilities pose a low potential risk to groundwater and surface water”.

The Board notes that the methodology related to use of the ERST is detailed in the NRCB document entitled “Environmental Risk Screening Tool”, available on the NRCB website at www.nrcb.ca. Specifically, the methodology to determine distance to surface water bodies, runoff from the facility, and the determination of site elevation above a flood plain is detailed as part of the ERST process. Further, the Board does not see evidence within the RFR to support Mr. Sakamoto’s assertion that a flood plain exists. Therefore, given the approval officer’s application of the ERST tool combined with his assessment of site topography, and the lack of evidence to the contrary, the Board finds that the approval officer adequately dealt with the issue of flood plains and surface water risk.

Impacts from Loss of Grandfathered Status

In the RFR, Mr. Sakamoto expressed concern regarding the effect of the loss of the Sundown CFO’s grandfathered status.

Deemed approvals describing grandfathering rights provided to CFOs issued a development permit prior to January 1, 2002, are described in AOPA section 18.1(1)(c):

18.1(1) If a confined feeding operation or manure storage facility...

(c) was constructed pursuant to a development permit that was issued before January 1, 2002 or was issued as described in section 10 of the Agricultural Operation Practices Amendment Act, 2001,

the owner or operator of the confined feeding operation or manure storage facility is deemed to have been issued an approval, registration or authorization under this Act.

In Decision Summary LA19017 Appendix D, the approval officer identified that Sundown’s original development permit #94-08 was issued by Lethbridge County on March 22, 1994, confirming its deemed approval. The approval officer reviewed aerial photos taken between 1999 and 2018 to determine which facilities were grandfathered under AOPA. The Board notes that through that assessment, and together with conversations with the applicant, the approval officer determined that excavation had occurred within the footprint of the grandfathered catchment area after 2002.

AOPA sections 13 and 14 prohibit the construction, expansion, or modification of a CFO or a manure collection or storage facility without an AOPA permit:

13(1) No person shall commence construction or expansion of a confined feeding operation for which an approval or registration is required pursuant to the regulations unless that person holds an approval or registration.

Within the decision summary, the approval officer noted that the alterations to the existing catchment area of the site negate the grandfathered status of the catchment area’s liner. The approval officer listed the CFO’s deemed facilities in Approval LA19017, noting that the existing

catchment area is to be decommissioned. The approval officer required, as part of the Approval, that the completion of this decommissioning must be confirmed by the NRCB in writing before the permit holder will be permitted to populate the proposed feedlot and recovery pens. The approval officer listed the permitted construction of a catch basin of dimensions 55 m x 50 m x 2 m deep, including conditions. The conditions require a professional engineer to certify the thickness and completed hydraulic conductivity of the catch basin clay liner, as defined by the Standards Regulation section 9(6)(b):

9(6) The liner of a manure storage facility and of manure collection area, if constructed of compacted soil or constructed of concrete, steel or other synthetic or manufactured materials, must provide equal or greater protection than that provided by compacted soil... (b) 1 m in depth with a hydraulic conductivity of not more than 5×10^{-7} centimetres per second for a catch basin....

The approval officer included as a condition in the Approval that construction of the catch basin shall immediately cease and that the NRCB will be contacted if the water table is observed to be one metre or less from the bottom of the catch basin liner. As well, an additional condition required an inspection by the NRCB prior to runoff being allowed to enter the catch basin.

The Board finds that the approval officer's assessment of the grandfathered status of the existing CFO is consistent with AOPA. With respect to the loss of grandfathered status of the existing runoff catchment area footprint, the Board finds that the approval officer appropriately requires construction of a new catch basin facility, given that the unauthorized construction in the existing runoff catchment area footprint removes the grandfathered status of that facility. The Board is satisfied that the conditions attached to the Approval adequately address the loss of grandfathered status of the runoff catchment area footprint. Therefore, the Board finds that issues relating to the grandfathering determination of the existing CFO have been adequately dealt with by the approval officer.

Effects on the Sakamoto Family, the Sakamoto Property, the Environment and the Community at Large

The RFR stated that the operation of Sundown's CFO has had and continues to have a significant adverse impact on Mr. Sakamoto and his family, the Sakamoto property, the environment and the community at large.

Section 6 of the Decision Summary as well as the Technical Document describe how the Sundown application meets all relevant technical requirements of AOPA, including setbacks from the Sakamoto residence, water wells, springs and common bodies of water; has sufficient means to control surface runoff of manure; meets the nutrient management requirements for land application of manure; and meets groundwater protection requirements for the design of floors and liners of manure storage facilities. Section 7 of the Decision Summary summarizes terms and conditions for Sundown's permit that will ensure that the relevant technical requirements are achieved. Appendix C provides additional details about these conditions. The Board believes that these safeguards will aid in mitigating potential adverse impacts on the Sakamoto family and property from the Sundown operation, and determines that this issue has been adequately dealt with by the approval officer.

Regarding effects on the environment, the approval officer stated in the Decision Summary that he assessed the effects of the proposed expansion on the environment and, consistent with NRCB policy, presumed that the effects are acceptable because the application meets all of AOPA's technical requirements. These technical requirements are detailed further in both the Decision Summary and the Technical Document. The Board finds that the approval officer adequately dealt with this issue.

Appendix A of the Decision Summary describes the land use provisions of the County's municipal development plan (MDP) that are relevant to this proposal and the approval officer's consideration of them. He concluded that the application is consistent with the MDP, and also indicated that the County raised no concerns with this application. The approval officer also reviewed the County's land use bylaw, and determined that the application is consistent with the land use zoning provisions. It is NRCB policy for approval officers to review an application's consistency with the MDP and land use bylaws and, if they are determined to be consistent, it is presumed that effects on the community are acceptable. The Decision Summary explains that the approval officer also determined that this proposal is consistent with the South Saskatchewan Regional Plan. The Board finds that the approval officer adequately dealt with the concern regarding effects on the community at large.

Non-compliance with Manure Storage and Animal Carcass Disposal Requirements

In the RFR, Mr. Sakamoto expresses concerns that the Sundown CFO has a history of non-compliance, specifically related to the location of manure storage piles and the disposal of animal carcasses. Mr. Sakamoto asserts that these areas of non-compliance have a serious and adverse impact on the Sakamoto family, resulting in health issues of asthma and breathing difficulties, as well as general health risks.

The Board notes that concern regarding the proximity of Sundown's manure storage piles to the Six Mile Coulee drainage canal was included in the Statement of Concern sent to the approval officer dated June 5, 2019. The approval officer did not comment on this in the Decision Summary, Appendix B "concerns raised by directly affected parties". However, Appendix C, section 2, "conditions not carried forward from municipal development permit #94-08", discusses that a municipal permit condition regarding manure stockpiles will not be carried forward. The explanation provided is that section 5 of the Standards Regulation includes requirements for manure storage setback distances to common bodies of water and neighbouring residences, and maximum duration of storage in one location.

5(1) In this section, "short term" means an accumulated total of not more than 7 months over a period of 3 years....

(3) A person to whom subsection (2) refers must store the solid manure, composting materials and compost not less than 150 metres from the nearest residence that is not owned or under the control of the owner or operator of the storage area....

(6) A short term solid manure, composting materials or compost storage site must be located at least 1 m above the water table and must not be located on land that

(a) is within 30 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is 4% or less,

(b) is within 60 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is greater than 4% but less than 6%,

(c) is within 90 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is 6% or greater but less than 12%, or

(d) has a mean slope of 12% or greater, where the land slopes towards the common body of water.

The Board notes that in the rebuttal filed by Sundown, the operator acknowledged an instance where a manure pile was incorrectly located near a natural drain in a field, and that the pile was removed when the issue came to its attention. The Board reminds all parties that compliance with the legislation regarding the location of manure storage piles applies to all CFOs; consequently, it is unnecessary to include any related conditions in an approval.

Therefore, the Board finds that the approval officer adequately dealt with the issue related to the location of manure storage piles. The NRCB maintains and manages compliance review and response through the NRCB complaint line, inspections, and enforcement action. The Board notes that anyone who has concerns that legislated requirements relating to manure storage are not being followed may contact the NRCB's 24 hour complaint line (1-866-383-6722). Calls directed to the complaint line are addressed by an NRCB inspector.

The issue of disposal of animal carcasses was not included in the Statement of Concern, therefore the approval officer was unaware of this concern when making his decision and writing the Decision Summary. However, disposal of dead animals is addressed in the Decision Summary Appendix C, section 2 regarding a condition from municipal development permit #94-08 which will not carry forward. The approval officer commented that the issue of dead animal disposal is regulated by Alberta Agriculture and Forestry under the *Animal Health Act*, and not within the legislated AOPA mandate. Therefore, the Board finds that the matter of disposal of animal carcasses is without merit for its consideration under AOPA.

Decision

As a result of the Board's deliberations, it has determined that the approval officer adequately considered all issues raised in the filed Request for Review, and therefore does not direct any matter to a hearing. The RFR is denied.

DATED at EDMONTON, ALBERTA, this 13th day of August, 2019.

Original signed by:

L. Page Stuart

Keith Leggat

Sandi Roberts

Daniel Heaney

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

Edmonton Office

4th Floor, Sterling Place, 9940 - 106 Street
Edmonton, AB T5K 2N2
T (780) 422.1977 F (780) 427.0607

Calgary Office

19th Floor, 250 – 5 Street SW
Calgary, AB T2P 0R4
T (403) 297.8269 F (403) 662.3994

Lethbridge Office

Agriculture Centre, 100, 5401 - 1 Avenue S
Lethbridge, AB T1J 4V6
T (403) 381.5166 F (403) 381.5806

Morinville Office

Provincial Building, #201, 10008 - 107
Street
Morinville, AB T8R 1L3
T (780) 939.1212 F (780) 939.3194

Red Deer Office

Provincial Building, #303, 4920 - 51 Street
Red Deer, AB T4N 6K8
T (403) 340.5241 F (403) 340.5599

NRCB Response Line: 1.866.383.6722

Email: info@nrcb.ca

Web Address: www.nrcb.ca

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